

## **CHAPTER 32-07 CLAIM AND DELIVERY**

### **32-07-01. Plaintiff may claim immediate delivery.**

The plaintiff in an action to recover the possession of personal property, at the time of issuing the summons or at any time before answer, may claim the immediate delivery of such property as provided in this chapter.

### **32-07-02. Plaintiff's affidavit.**

When a delivery is claimed, an affidavit must be made by the plaintiff, or by someone in the plaintiff's behalf, stating:

1. That the plaintiff is the owner of the property claimed, particularly describing it, or lawfully is entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth.
2. That the property is detained wrongfully by the defendant.
3. The alleged cause of the detention thereof according to the affiant's best knowledge, information, and belief.
4. That the property has not been taken for a tax, assessment, or fine pursuant to a statute, nor seized under an execution or attachment against the property of the plaintiff, or if so seized, that it by statute is exempt from such seizure.
5. The actual value of the property.
6. That a court order has been issued authorizing delivery hereunder, and is attached:
  - a. Pursuant to notice to defendant and hearing on an order to show cause; or
  - b. Without notice to defendant if, in addition to satisfying the requirements for an order to show cause, probable cause appears to the court that:
    - (1) The defendant gained possession of the property by theft or fraud;
    - (2) The property consists of one or more negotiable instruments or credit cards;
    - (3) The property is perishable and will be irreparably damaged before a hearing can be held; or
    - (4) The property is in immediate danger of destruction, serious harm, concealment, or removal from the state, or of sale to an innocent purchaser.

### **32-07-03. Requisition to sheriff.**

The plaintiff, by an endorsement in writing upon the affidavit, may require the sheriff of the county where the property claimed may be to take the same from the defendant and deliver it to the plaintiff.

### **32-07-04. Security by plaintiff.**

Upon the receipt of an affidavit and requisition as provided in section 32-07-03 with a written undertaking executed by one or more sufficient sureties approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in such affidavit, for the prosecution of the action for the return of the property to the defendant, if return thereof is adjudged, and for the payment to the defendant of such sum as for any cause may be recovered against the plaintiff, the sheriff forthwith shall take the property described in the affidavit, if it is in the possession of the defendant or the defendant's agent, and shall retain it in the sheriff's custody. The sheriff also without delay shall serve on the defendant a copy of the affidavit, requisition, and undertaking by delivering the same to the defendant personally, if the defendant can be found, or to the defendant's agent from whose possession the property is taken, or if neither can be found, by leaving them at the usual place of abode of either with some person of suitable age and discretion.

### **32-07-05. Exceptions by defendant to sufficiency of sureties or amount of undertaking.**

The defendant, within three days after the service of a copy of the affidavit, requisition, and undertaking, may give notice to the sheriff that the defendant excepts to the sufficiency of the

sureties, or the amount of the undertaking. If the defendant fails to do so, the defendant shall be deemed to have waived all objection to them. When the defendant excepts to the sufficiency of the sureties, the sureties shall justify as provided in chapter 32-02, and the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they shall justify or new sureties shall be substituted and shall justify. If the defendant excepts to the sureties, or to the amount of the undertaking, the defendant cannot reclaim the property as provided in section 32-07-06. When the defendant excepts to the amount of the undertaking, the sheriff shall retain possession of the property for five days after the service of notice of such exception upon the sheriff. In such case the defendant, upon two days' notice to the plaintiff, may apply to the judge of the court in which the action is pending for an order requiring the plaintiff to execute an undertaking in such action in a larger amount than that of the undertaking which has been served. The affidavits upon which the defendant bases the defendant's application shall be served with the notice. If the application is denied, the order of the court shall direct the sheriff forthwith to deliver the property to the plaintiff. If the application is granted, the order of the court shall direct the sheriff to deliver the property to the defendant unless the plaintiff within a time of not more than four days, to be fixed by the court, shall execute a bond in such sum as the court shall prescribe, with sureties to be approved by the sheriff.

#### **32-07-06. Redelivery to defendant.**

At any time before the delivery of the property to the plaintiff, the defendant, if the defendant does not except to the sureties of the plaintiff or the amount of the plaintiff's undertaking, may require the return thereof upon giving to the sheriff a written undertaking executed by two or more sufficient sureties to the effect that they are bound in double the value of the property as stated in the affidavit of the plaintiff for the delivery thereof to the plaintiff, if such delivery is adjudged, and for the payment to the plaintiff of such sum as for any cause may be recovered against the defendant. If a return of the property is not so required within three days after the taking and service of notice on the defendant, it shall be delivered to the plaintiff except as provided in section 32-07-10.

#### **32-07-07. Justification.**

The defendant's sureties shall justify in the manner provided in chapter 32-02. Upon such justification the sheriff shall deliver the property to the defendant and the undertaking to the plaintiff. The sheriff shall be responsible for the defendant's sureties, until they justify, or until justification is completed or expressly waived, and may retain the property until that time, but if they, or others in their place, fail to justify at the time and place appointed, the sheriff shall deliver the property to the plaintiff.

#### **32-07-08. Concealed property.**

If the property, or any part thereof, is concealed in a building or enclosure, the sheriff publicly shall demand its delivery. If it is not delivered, the sheriff shall cause the building or enclosure to be broken open and shall take the property into the sheriff's possession, and, if necessary, the sheriff may call to the sheriff's aid the power of the county.

#### **32-07-09. Keeping property.**

When the sheriff shall have taken property as in this chapter provided, the sheriff shall keep it in a secure place and shall deliver it to the party entitled thereto upon receiving the sheriff's lawful fees for taking and the sheriff's necessary expenses for keeping the same.

#### **32-07-10. Claim by third person.**

If the property taken is claimed by any person other than the defendant or the defendant's agent, and such person shall make affidavit of such person's title thereto and right to the possession thereof, stating the grounds of such right and title, and shall serve the same upon the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff on demand shall indemnify the sheriff against such claim by an undertaking

executed by two sureties in the amount of the value of the property as specified in the affidavit of the plaintiff. No claim to such property by any person other than the defendant or the defendant's agent shall be valid against the sheriff, unless made as aforesaid, and notwithstanding such claim, when so made, the sheriff may retain the property a reasonable time to demand such indemnity.

**32-07-11. Papers filed with clerk.**

The sheriff shall file the notice and affidavit, with the sheriff's proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

**32-07-12. Specific personal property - Jury to find value and damages.**

In an action for the recovery of specific personal property, the jury shall find by its verdict the facts, as the case may be, as follows:

1. In case it finds against the defendant and the property has not been delivered to the plaintiff, it shall find the value of the property, or of the plaintiff's interest therein, if less than its full value, at the time of the taking, and that the plaintiff is entitled to a delivery of the property, and it also shall assess the damages, if any are claimed in the complaint, which the plaintiff has sustained by reason of the taking and detention of such property.
2. In case it finds against the defendant and the property has been delivered to the plaintiff, it also shall assess the damages, if any are claimed in the complaint, which the plaintiff has sustained by reason of the taking and detention of such property.
3. In case it finds against the plaintiff and the property has been delivered to the plaintiff, and the defendant in the defendant's answer claims a return of the property, it shall find the value thereof, or of the defendant's interest therein, if less than its full value, at the time of the taking, and it also shall assess the damages, if any are claimed in the answer, which the defendant has sustained by reason of the taking and detention of such property.
4. In case it finds against the plaintiff and the property has been retained by the defendant, it shall find that the defendant is entitled to such property.
5. In case the jury finds that each party is entitled to a specific portion of the property in controversy and such portion has been delivered to the opposite party and a return is claimed in the complaint or answer, it shall find the value of such portion, or of the party's interest therein, if less than its full value, at the time of the taking, and also shall assess the damages, if any are claimed in the complaint or answer, in favor of the plaintiff or defendant as hereinbefore provided as to the portion to which it finds the plaintiff or defendant entitled.
6. Whenever the jury is so instructed, it shall find the value of specific portions of the property in controversy or of the interest of either party therein, if less than its full value, at the time of the taking and also shall assess the damages, if any are claimed by the party in whose favor it finds, sustained by reason of the taking and detention of such property.